Karpal Singh a/l Ram Singh v DP Vijandran

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-02 OF 2002(W)
MOHAMED DZAIDDIN CHIEF JUSTICE, AHMAD FAIRUZ CJ (MALAYA) AND SITI NORMA YAAKOB FCJ
27 FEBRUARY 2003

Civil Procedure *— Interest — Interest in defamation cases — No claim for interest on damage sought made in the writ of summons or statement of claim — No omnibus prayer in writ of claim seeking further or other relief — Whether court could in its discretion award interest on damages*

Some time in March 1996, the appellant made a press statement published in two local English dailies concerning the conduct of the respondent in issuing a dishonored cheque to the appellant. As a result of the above publication, the respondent sued the appellant and the two English dailies for libel and claimed damages, injunction and costs. The High Court gave judgment for the respondent. As against the appellant, the trial judge awarded RM500,000 for compensatory and aggravated damages with interest at the rate of 4%pa from the date of the press statement and costs. The appellant appealed against the whole of the decision. The Court of Appeal dismissed the appeal against liability. On quantum, it held that the award was excessive and reduced the amount awarded by the High Court. The Court of Appeal did not however disturb the award of interest of 4%pa. On further appeal, leave was granted by the Federal Court on the following question of law: whether in a defamation action, interest ought to be awarded by the court on the damages ordered to be paid, particularly, where no claim for interest on the adjudged sum is made in the writ of summons or statement of claim and there is no omnibus prayer therein seeking any further or other relief deemed fit and proper.

Held, dismissing the appeal with costs:

Under the new O 18 r 8(4) of the (English) Rules of the Supreme Court, all claims for interest must be specifically pleaded, whereas the corresponding provision in O 18 r 8 of the Malaysian Rules of the High Court 1980 ('the RHC') has not been amended. After considering O 18 r 8 of the Malaysian RHC and O 18 r 8(4) of the English Rules of the Supreme Court, the applicable rule would be O 18 r 8 of the Malaysian RHC. Therefore, in the absence of specific provision that claims for interest must be pleaded in the pleadings in the Rules of the High Court, a judge in the exercise of his discretion can award such interest. It is unfair to deprive plaintiffs of interest for the period in which they have been deprived of their money, as interest ought to be awarded to the extent that is fair and proper. Thus, in the instant appeal, the trial judge had acted fairly when he awarded interest at half the normal rate, ie 4% from the date of publication to date of judgment and thereafter until the date of realization

(see pp 388D–F, 392C–D); *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 followed.

[Bahasa Malaysia summary

Pada Mac 1996, perayu telah membuat pernyataan akhbar yang dilaporkan di dalam dua akhbar Bahasa Inggeris tempatan mengenai kelakuan responden dalam memberi cek tendang kepada perayu. Responden telah mendakwa perayu dan kedua-dua akhbar Bahasa Inggeris tempatan tersebut dalam libel dan menuntut ganti rugi, injunksi dan kos. Mahkamah Tinggi telah memutuskan untuk responden. Hakim telah memberi award RM500,000 untuk ganti rugi pampasan dan ganti rugi teruk dengan faedah pada 4%pa daripada tarikh pernyataan akhbar tersebut dan kos terhadap perayu. Perayu telah merayu keseluruhan keputusan tersebut. Mahkamah Rayuan telah menolak rayuan terhadap liabiliti. Mengenai kuantum, mahkamah telah memutuskan bahawa award tersebut adalah keterlaluan dan telah mengurangkan jumlah yang diawardkan oleh Mahkamah Tinggi. Mahkamah Rayuan tidak campur tangan dalam award faedah 4%pa. Di dalam rayuan lanjutan, Mahkamah Persekutuan telah memberikan kebenaran di atas soalan fakta berikut: sama ada di dalam tindakan fitnah, faedah patut diawardkan oleh mahkamah pada ganti rugi yang diperintahkan dibayar, khususnya, di mana tiada tuntutan untuk faedah pada jumlah yang dihakimi dibuat di dalam writ saman ataupun penyata tuntutan dan tidak terdapat permohonan pelbagai di dalamnya menuntut relif-relif lanjut yang sesuai.

Diputuskan, menolak rayuan dengan kos:

Di bawah A 18 k 8(4) Kaedah-Kaedah Mahkamah Agung (England), segala tuntutan untuk faedah mesti dipohon dengan jelas, manakala peruntukan bersamaan A 18 k 8 Kaedah-Kaedah Mahkamah Tinggi 1980 Malaysia ('KMT') belum dipinda. Setelah mempertimbangkan A 18 k 8 KMT Malaysia dan A 18 k 8(4) Kaedah-Kaedah Mahkamah Agung (England), kaedah yang terpakai adalah A 18 k 8 KMT Malaysia. Oleh itu, di dalam ketiadaan peruntukan khusus di mana faedah mesti dituntut di dalam pliding-pliding di dalam Kaedah-Kaedah Mahkamah Tinggi, seseorang hakim di dalam melaksanakan budibicara beliau boleh mengawardkan faedah tersebut. Ia tidak adil untuk tidak memberi plaintif faedah untuk tempoh di mana plaintif tidak dibayar wang memandangkan faedah patut diawardkan seperti mana yang adil dan sesuai. Oleh itu, di dalam rayuan ini, hakim perbicaraan telah berlaku adil dalam mengawardkan faedah separuh daripada kadar biasa, iaitu 4% daripada tarikh penerbitan sehingga tarikh keputusan dan selepas itu sehingga tarikh realisasi (lihat ms 388D–F, 392C–D); *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 diikut.

Notes

For cases on interest, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3009–3067.

Cases referred to

Australian Consolidated Press Ltd v Driscoll 1988 NSW Lexis 9678 (refd)
BP Exploration Co (Libya) Ltd v Hunt (No 2) [1982] 1 All ER 925 (refd)
Jefford v Gee [1970] 1 All ER 1202 (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310 (refd)
John Fairfax & Sons Ltd v Kelly (1987) 8 NSWLR 131 (folld)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Riches v Westminster Bank Ltd [1943] 2 All ER 725 (refd)
Saunders & Anor v Edwards & Anor [1987] 1 WLR 1116 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 8
Rules of the Supreme Court [Eng] O 18 r 8(4)

Appeal from: Civil Appeal No W–02–385 of 2000 (Court of Appeal, Kuala Lumpur)

Karpal Singh a/l Ram Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*).

DP Vijandran (*MS Murthi* and *P Selvaraj* with him) (*DP Vijandran Associates*).

Mohamed Dzaiddin Chief Justice (delivering judgment of the court): The brief facts of the case giving rise to this appeal are as follows. Both the appellant and respondent are senior lawyers practising under the style of their personal names. Sometime in March 1996, the appellant made a press statement published in two local English dailies concerning the conduct of the respondent in issuing a dishonoured cheque to the appellant. As a result of the above publication, the respondent sued the appellant and the two English dailies for libel and claimed damages, injunction and costs.

The High Court gave judgment for the respondent against the three defendants. As against the appellant, the trial judge awarded RM500,000 for compensatory and aggravated damages with interest at the rate of 4%pa from the date of the press statement and costs.

The appellant appealed against the whole of the decision. The Court of Appeal dismissed the appeal against liability. On quantum, it held that the award was excessive and reduced the amount awarded by the High Court. The Court of Appeal did not however disturb the award of interest of 4%pa.

On further appeal, leave was granted by this court on the following question of law: whether in a defamation action, interest ought to be

awarded by the court on the damages ordered to be paid, particularly, where no claim for interest on the adjudged sum is made in the writ of summons or statement of claim and there is no omnibus prayer therein seeking any further or other relief deemed fit and proper by the honorable court. A

Before us, the thrust of Mr Karpal Singh's argument was that interest could not be awarded on damages in a defamation action. First, he contended that in the present case the interest was not specifically pleaded in the indorsement in the writ of summons or in the statement of claim. There was also no omnibus prayer seeking any further or other relief in the pleadings. Mr Karpal Singh relied on a passage in *Gatley on Libel and Slander* (9th Ed) para 26.36, which states, inter alia, that 'where there is no claim for interest, no interest will be awarded in the absence of amendment'. B C

Secondly, he submitted that the Court of Appeal had seriously misdirected itself when it affirmed the High Court's award of 4% interest on the reduced amount of damages against him. He relied on *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, following *Saunders & Anor v Edwards & Anor* [1987] 1 WLR 1116 which held that interest was not awarded on damages in defamation actions. D

In reply, Mr Vijandran submitted that the paragraph in *Gatley* which was relied by the appellant is the current position in England. He pointed out that under the new O 18 r 8(4) of the (English) Rules of the Supreme Court, all claims for interest must be specifically pleaded, whereas the corresponding provision in our Rules of the High Court 1980 has not been amended. Relying on *Jefford v Gee* [1970] 1 All ER 1202, Mr Vijandran submitted that the court may award interest despite it not being pleaded in the statement of claim. E

After considering O 18 r 8 of the Rules of the High Court 1980 and the English Supreme Court Practice 1997 (Vol 1) on O 18 r 8(4), I agree with Mr Vijandran that in this case, the applicable rule is our O 18 r 8. Therefore, in the absence of specific provision that claims for interest must be pleaded in the pleadings in the Rules of the High Court 1980, a judge in the exercise of his discretion can award such interest. See *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 161, *Riches v Westminster Bank Ltd* [1943] 2 All ER 725 and *Jefford v Gee*. F G

On the substantive issue, he submitted that we should follow some Commonwealth countries where prejudgment interest on defamation damages can be awarded. He referred us to authorities from Australia, Canada and Hong Kong which I shall examine shortly. The respondent also drew an analogy with the award of interest on personal injury claims and submitted that there was absolutely no reason why there should be a difference between physical pain and suffering and mental pain and suffering. Lastly, he submitted that the dicta of *Saunders* which was followed by *Jeyaretnam* conflicted with the earlier decision of the House of Lords in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925. H I

In *Jeyaretnam*, Mr Lee Kuan Yew commenced an action against Mr Jeyaretnam for slander. The Singapore High Court found in favor of Mr

Lee and awarded him $260,000 for damages with interest of 6%pa from the date of the writ and costs. Mr Jeyaretnam appealed against the said decision.

The Court of Appeal dismissed the appeal on the ground that the learned judge had taken into account all the relevant factors.

On the issue of interest on damages, it was argued by learned counsel for the appellant that the learned judge was wrong in awarding interest on the general damages. He submitted that in defamation actions, damages are awarded for the injury to the plaintiff's reputation as at the date of the trial, and circumstances occurring after the publication, whether they be aggravating or mitigating, up to trial and during trial itself, are taken into account, as the court did in this case. For this reason, interest on damages ought not to have been awarded, citing in support *Saunders*. Counsel for the respondent seemed to concede that in England interest has never been awarded in a defamation action. The Court of Appeal (per LP Thean J) agreed fully with the appellant's counsel that interest ought not to be awarded and accordingly varied the judgment of the High Court by disallowing interest on the damages awarded.

In *Saunders*, the plaintiffs claimed rescission of the contract of sale of the leasehold of a flat after the defendant had fraudulently represented that it included a roof garden. The judge awarded the plaintiffs £7,000 as damages for misrepresentation and an additional £500 for disappointment and inconvenience and interest at the rate of 12½% from the date of the writ. On appeal, the Court of Appeal allowed the appeal to the extent of reducing the damages to £4,350 and disallowing the interest on the sum of £500. Kerr LJ stated (at p 1129):

> What is challenged is the award of interest on it, and at a commercial rate, from the issue of the writ. The power to award interest is now governed by s 35A of the Supreme Court Act 1981 [as inserted by s 15(1) of the Administration of Justice Act 1982]. We were rightly reminded of what was said by the House of Lords in regard to appeals on questions of interest in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 especially at p 992, [1983] 2 AC 352 especially at pp 373–374 per Lord Brandon. But in my view this is a case in which this court should interfere with the judge's award of interest, because he must have erred in principle. It is clear that he took account of all the circumstances up to the time of judgment, and indeed to some extent he looked into the future. He was quite right to do so. But on that basis there could be no justification for awarding interest from the date of the writ. That would only be right if the plaintiffs should have had that sum in their pocket there and then, as in cases of breach of contract. That is contradicted by the judgment itself. Since the judge's exercise of discretion cannot stand, we must substitute our own view.

In his judgment, Bingham LJ who agreed with Kerr LJ stated at p 1135:

> The judge's award was clearly intended to compensate the plaintiffs for the inconvenience they had suffered throughout their occupation of the flat up to the date of trial and for disappointment during the same period. It was a single global award, modest in amount but intended to cover the past and the future. *It is somewhat analogous to an award of general damages to a defamation plaintiff*

> *for mental distress and suffering, which have never, as I think, been augmented by interest up to the date of the trial.* I consider this approach to be correct in principle, because in neither case can the damages be realistically seen as having accrued due to the plaintiff at a certain time in the past and as having thereafter been wrongly withheld from him. (Emphasis added.)

Pausing here, I have two observations to make regarding the above authorities. First, *Saunders* which was followed by *Jeyaretnam* was not dealing with the award of interest on damages in a defamation action. On the basis that the trial judge erred in principle, Kerr LJ felt that there was a case which the Court of Appeal should interfere with the judge's award of interest on damages for disappointment and inconvenience not for defamation, but fraudulent misrepresentation that the flat included a roof garden.

Secondly, what had persuaded the Singapore Court of Appeal in *Jeyaretnam* to conclude that interest ought not to have been awarded in the case must have been the passage from the judgment of Bingham LJ, which I have alluded to above, where his Lordship likened the judge's award in *Saunders* to be 'somewhat analogous to an award of general damages to a defamation plaintiff for mental distress and suffering, which have never, as I think, been augmented by interest up to the date of the trial'. Hence, the conclusion that in England interest has never been awarded in a defamation action.

In my view, a far more relevant authority with regard to this issue before us in this appeal is the Australian case of *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131. This was an appeal against an award of damages for defamation on the ground that the damages were excessive and a cross-appeal from the trial judge's decision refusing to make an award of interest on the damages so awarded or any part thereof. By a majority decision, the New South Wales Court of Appeal allowed the cross-appeal on the award of interest.

The issue in the cross-appeal was whether the trial judge erred in the exercise of his discretion in refusing to make an award of interest on the damages or any part thereof.

It is to be noted that in Australia the source of the power of the court to award interest on damages is s 94(1) of the Supreme Court Act 1970 (which is similar to our s 11 of Civil Law Act 1956) which stipulates that the court in an action for damages may order that interest be awarded 'at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect'.

In his judgment, McHugh JA gave the following reasons at p 142:

> The settled doctrine of the Australian courts relating to awards of interest requires that interest should be awarded for real and practical, and not merely theoretical, losses: *Fire and All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427 at p 432; *Thompson v Faranio* (1979) 54 ALJR 231 at p 233. Speaking generally, I think that the plaintiff in a defamation action is entitled to interest on each of the ordinary elements of the award of damages in a

A defamation action. If, of course, it appears that part of the award may reflect damages for damage which will be incurred after the date of the verdict, no interest can be awarded on that component of the award: *Fire and All Risks Insurance Co Ltd v Callinan* at p 432. But except in that class of case the plaintiff in my opinion has a prima facie entitlement to interest on the whole award.

B In a practical as well as a theoretical sense, the plaintiff in a defamation action is entitled on publication to damages. In particular, he is entitled to damages to vindicate him. A plaintiff in such an action sustains loss for each day that the defendant fails to pay the appropriate damages to him. However, it does not follow that the plaintiff is entitled to interest on the whole award. In many cases the award will reflect an amount for continuing injury to C feelings and reputation to the date of verdict. Hence the amount awarded may, and usually will, be higher than the amount which would have been awarded as at the date of publication or even as at the date of the writ. Paradoxically, the amount awarded as vindication per se will inevitably reduce as the damages increase for continuing injury. This is because the award of damages for actual injury will also partly serve the purpose of vindicating the D plaintiff's reputation. However, there is no strict correlation between the damages for vindication and the damages for injury to feelings and reputation. ... Any award of interest must reflect that fact.

Further, in discussing the approach to the question of interest, his Lordship said at p 143:

E The correct approach in theory would seem to be that, since the plaintiff was entitled to damages immediately upon publication, the proper inquiry is first to determine to what extent the award was increased by reason of continuing injury. In strict theory the interest, in respect of this additional sum, would need to take account of the fact that the injury was spread over a period after publication. That is, leaving aside any question of future loss, the matter F should be approached on the basis that the plaintiff is prima facie entitled to interest on the whole amount of the award from the date of publication. However, that amount has to be reduced for any sum additional to 'vindication damages' awarded in consequence of injury suffered between publication and verdict. This approach gives rise to obvious difficulties of assessment. But if, as I think is the case, the plaintiff is entitled to at least part of his damages from the date of publication, the choice is between awarding G no interest at all or attempting to calculate interest on a basis which, although not mathematically perfect, achieves a measure of justice. Since it is unfair to plaintiffs to deprive them of interest for the period in which they have been deprived of their money, interest ought to be awarded to the extent that it is fair and proper.

H An application was made to the High Court for leave to appeal against the above decision. In refusing leave, Mason CJ said:

In our view, the Court of Appeal was correct in concluding that s 94 of the Supreme Court Act confers on that court a discretionary power to award interest on damages in defamation cases. Given the existence of this discretionary power as an element in the procedure of the Supreme Court, we I are not presently persuaded that the decision of the Court of Appeal involved such an error of principle as to justify the grant of special leave to appeal. The application is therefore refused. (Reported in (1987) 20 Leg Rep SL 4).

Kelly was followed in *Australian Consolidated Press Ltd v Driscoll* 1988 NSW Lexis 9678 which dealt with the same issue as in the cross-appeal in *Kelly*. There, the court also held that interest was recoverable on damages for defamation. A

From the authorities cited in this appeal, I would adopt and follow *Kelly* because it is directly on the point where the issue of interest on damages in a defamation action was fully argued. On the other hand, the English decision in *Saunders* which was followed in *Jeyaretnam* did not clearly discuss the issue, but the case was only obiter in its reference to defamation cases in England. B

Having considered the reasonings of McHugh JA in *Kelly*, in particular his approach to the question of interest in defamation damages, in my opinion, given the existence of the discretionary power vested on the trial judge by s 11 of the Civil Law Act 1956, there is no reason for me to disagree with *Kelly* and I would therefore apply the ratio in *Kelly* to this appeal. In addition, I wholeheartedly agree with McHugh JA when he stated that it was unfair to deprive the plaintiffs of interest for the period in which they have been deprived of their money, as interest ought to be awarded to the extent that is fair and proper. Thus, in the instant appeal, the trial judge had acted fairly when he awarded interest at half the normal rate ie 4% from the date of publication to date of judgment and thereafter until the date of realization. C D

For reasons stated above, I would answer the question in this appeal in the affirmative. E

Lastly, I have shown this judgment in draft to my learned brother Ahmad Fairuz CJ (Malaya) and learned sister Siti Norma Yaakob FCJ who agreed with my reasons and conclusion.

This appeal is therefore dismissed with costs and the deposit be paid out to the respondent to account of his taxed costs. F

Appeal dismissed with costs.

Reported by Peter Ling

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